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April 17, 2015

VIA ECF

Hon. Leonard D. Wexler
United States District Judge
United States District Court
Eastern District of New York
944 Federal Plaza
Central Islip, NY 11722

Re: *Lopez v. Setauket Car Wash & Detail Center, et al.*
12-CV-6324 (LDW) (AYS)

Dear Judge Wexler:

This firm represents the Plaintiffs in this putative collective and class action lawsuit, which was brought to recover unpaid overtime wages under the Fair Labor Standards Act, 29 U.S.C. §201 et seq. ("FLSA"), and the New York Labor Law, §650 et seq. ("NYLL"). We write to respectfully request a pre-motion conference. Plaintiffs intend to move for class certification of their NYLL claims pursuant to Rule 23. They seek certification of a class consisting of all present and past car wash attendants employed by Defendants during the applicable statutory period.

The Plaintiffs are former employees of Defendants who worked as car wash attendants and were employed by Defendants to assist in the cleaning of the interior and/or exterior of cars, or drying of cars, to do general maintenance work including cleaning machines, equipment and the premises.

It is undisputed, based upon Defendants' payroll records and their responses to Plaintiffs' written interrogatories that Defendants claimed an allowance for tips toward the statutory minimum hourly wage. Plaintiffs allege that Defendants are not entitled to a tip credit because they failed to meet the requirements of the rules promulgated by the Commissioner of Labor pursuant to the Minimum Wage Act. NYCRR §142-2.5(b) provides that tips may be considered as part of the minimum wage only if substantial evidence- such as a statement signed by the employee- is provided that (1) the employee received in tips at least the amount of the allowance claimed and (2) the allowance claimed by the employer is recorded on a weekly basis as a separate item in the wage record. In this case, Defendants have not provided statements signed by their employees that the employees received the amount of the allowance claimed and Defendants' principal testified at deposition that the allowance claimed by Defendants was not recorded on a weekly basis as a separate item.

Plaintiffs worked more than forty hours per week without being paid overtime at the rate of one and one-half times the statutory minimum hourly rate. Defendants' principal confirmed during his deposition that since 2012, Defendants' practice has been to calculate overtime by multiplying 1.5 times the hourly tip credit rate of $6.50, rather than 1.5 times the statutory minimum hourly rate and that this is the method used to calculate overtime for all car wash attendants.[1]

By Order entered June 17, 2014, the Court granted Plaintiffs' motion to conditionally certify a collective action pursuant to 29 U.S.C. §216(b) and directed Defendants to provide a list of car wash attendants employed for the six year period prior to the commencement of the lawsuit. To facilitate the notice, Defendants identified approximately 90 car wash attendants. (See attached Employee List).

Plaintiffs' FLSA and NYLL claims derive from a common nucleus of operative facts and out of the same alleged unlawful conduct of Defendants, i.e., that Defendants failed to pay Plaintiffs and putative Class Members overtime required by statute. This case satisfies all of Rule 23's requirements.

The class is so numerous that joinder of all members is impracticable. In the Second Circuit, courts presume that joinder is impracticable where the class exceeds 40 members. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, it is undisputed that Defendants employed more than 80 car wash attendants during the applicable statutory period. Therefore, numerosity is satisfied.

Common questions of law and fact predominate over any questions affecting individual members because the proposed class was subject to the same practice of underpayment. The Named Plaintiffs' claims are typical of the proposed class members' claims. Plaintiffs' factual allegations and legal arguments apply to the proposed class across the board to all car wash attendants who have been denied minimum wages and overtime pay. The claims of the Plaintiffs and all other class members arise from the same course of conduct of Defendants and are based on the same legal claim – that Defendants breached their statutory obligations to pay the wages required by the NYLL. Therefore, typicality is satisfied.

The Named Plaintiffs will fairly and adequately protect the interests of the class because Plaintiffs' counsel has extensive experience litigating wage and hour cases under the FLSA and NYLL both in class actions and in individual suits. The Named Plaintiffs share identical claims with the proposed class members and they do not have any interests that are antagonistic to the proposed class members.

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[1] Plaintiffs allege that prior to 2012, Defendants failed to pay any overtime. It is undisputed that Defendants failed to maintain and preserve weekly records which show for each employee the number of hours worked daily as required by NYCRR §142-2.6.

Finally, a class action is superior to litigation by individual plaintiffs because resolving the common issues on a class-wide basis will create uniform resolution of the issues under state and federal law and achieve judicial economy, convenience and fairness to all parties.

Accordingly, Plaintiffs respectfully request that this Court schedule a pre-motion conference to establish a briefing schedule in connection with their contemplated motion for class certification of their NYLL claims pursuant to Rule 23

Respectfully submitted,

FRANK & ASSOCIATES, P.C.

Peter A. Romero, Esq.

cc: Saul D. Zabell, Esq. via ECF

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August 4, 2014

VIA FIRST CLASS MAIL &
VIA ELECTRONIC MAIL

Peter A. Romero, Esq.
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Re: **Lopez, et al. v. Setauket Car Wash & Detail Center, TLCW, Inc., et al.**
Case No.: 12-CV-6324 (LDW)(ARL)

Dear Peter:

Enclosed please find Defendants' list of Setauket Car Wash employees and last known addresses over the past six year period. All individuals who were not car wash attendees have been redacted.

Please contact me should you have further questions regarding the enclosed.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul D. Zabell

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